COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2201-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARY LOU MCCLAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 VERGERONT, J. Mary Lou McClain appeals the judgment of conviction and sentence for misappropriation contrary to WIS. STAT.

§ 943.20(1)(b) and (3)(c) (1999-2000)[1] and the trial court's order denying her motion to withdraw her no contest plea before sentencing. She contends the trial court erroneously exercised its discretion in denying her motion to withdraw her plea because it (1) held that as a matter of law she may not rely on her own assertions that a fair and just reason exists for plea withdrawal, but must offer some other evidence; (2) held that as a matter of law she must "overcome" her attorney's credibility; (3) failed to liberally apply the standard for plea withdrawal; and (4) failed to consider whether she adequately understood the available defenses prior to her entry of the plea. We conclude the trial court did not erroneously exercise its discretion and we therefore affirm.

BACKGROUND

¶2 The charge arose out of McClain's employment with Volunteers in Probation (VIP). The complaint filed on February 10, 1999, alleged that while serving as interim executive director for VIP, McClain issued checks with her sole signature to reimburse herself for expenses and compensate herself at a rate greater than the agreed upon $1,500 per month; she did this without VIP's consent, contrary to her authority, and in violation of the requirement that all checks issued on VIP's bank account must contain two signatures, including one signature of a member of the board of directors. McClain appeared on February 23, 1999, with Attorney Erin Hahn and waived her right to a preliminary hearing. The following month McClain retained Attorney Stephen Eisenberg, who represented her through the plea hearing on August 2, 1999.

[1] All references to the Wisconsin Statutes are the 1999-2000 version unless otherwise noted.

¶3 At the plea hearing McClain entered a no contest plea pursuant to an agreement with the State whereby sentencing would be set over for a period of approximately sixty days to enable McClain to pay the restitution, which she and the State were to agree upon. If she paid the restitution in full by the date of sentencing, there would be a joint recommendation for two years' probation with a condition of four months in jail, all to be served by electronic monitoring, and should she successfully complete a thirty-day inpatient alcohol program, every day in that program would count as a day on electronic monitoring.[2]

¶4 Before accepting her plea, the court asked McClain a series of questions. McClain acknowledged that she reviewed the plea questionnaire with Eisenberg, he explained the rights she was waiving, she truthfully answered the questions on the form, and she signed it. She answered "yes" to the questions of whether she had sufficient time to discuss the facts of her case, the elements of the offense and the consequences of her plea with Eisenberg, and whether she was satisfied with the representation she had received. Eisenberg answered "yes" to the court's questions of whether he had had enough time to discuss the case and the consequences of the plea with McClain, and whether he believed she was acting knowingly and voluntarily in entering the plea. Based on these and other answers to its questions, the court found McClain knowingly and voluntarily entered the plea.

¶5 On October 4, 1999, before sentencing, McClain replaced Eisenberg with Attorney Michael Fitzgerald. On November 23, still before sentencing, McClain moved to withdraw her plea on the following grounds: (1) she was

[2] The plea agreement also contained provisions for what would occur if the agreed upon restitution were not paid by the date of sentencing.

innocent of the charge against her; (2) she consistently asserted her innocence to her attorney including at the time of the no contest plea; (3) her plea was entered in haste without adequate consideration of available defenses; and (4) she had a viable defense to the charge, which Eisenberg did not discuss with her.

¶6 At the evidentiary hearing on her motion, both McClain and Eisenberg testified. McClain testified as follows. She met with Eisenberg a total of three times at his office before the no contest plea and one time just before the plea hearing, and each time she protested her innocence. She explained to Eisenberg why she believed that as executive director of VIP she had the authority to pay herself for additional work she did on the Transitional Living Program (TLP) when another VIP employee ceased performing those duties. Although she asked Eisenberg to research any possible legal defenses to the charge, he never explained to her the concept of implied consent as a defense; if she had known about the implied consent defense before the plea, she would have never entered the plea.

¶7 On July 29, 1999, three days before the plea hearing, McClain faxed Eisenberg a letter that was prompted by a letter he had sent to the prosecutor. In the letter McClain explained why she believed she had the authority to pay herself for performing the other employee's responsibilities with TLP and questioned why certain people had not been interviewed. She asked whether there was any case law on a case such as hers, what the legal authority was for saying she did not have the authority to do what she did, and what were the consequences of the charge since it might affect her future employment and other activities. She made some corrections to the information Eisenberg had conveyed to the prosecutor, including that she had suggested two, not three, years' probation and in-patient treatment for alcohol, not drugs, and that she would "only agree to this in lieu of a

monitoring arrangement." She also wanted the opportunity to point out inaccurate statements made by VIP employees to the investigating officer. McClain concluded the letter by saying: "Also I would not be interested in the plea without an agreement with Ms. Sales as what her terms will be. It occurs to me that if I plead 'no contest' to a felony, she has a free rein to impose what ever [sic] she wants. I want an answer from her prior to any plea. My life is on the line here and I want some assurances."

¶8 McClain testified she did not receive an immediate response to that letter so she faxed Eisenberg another letter on July 30. In this letter she commented on the report of the investigator whom Eisenberg had hired, disputing some of the statements by VIP employees related in the report, and questioning the omission of a summary of the investigator's conversation with a particular VIP employee and his failure to interview other people she had told him to call. McClain stated she was not happy with the manner in which the case had been handled, felt Eisenberg was "not in [her] camp from the start and perhaps [was] making deals with the DA which [she] did not authorize." She felt she was entering a plea of no contest or guilty, which she described as the "same thing," because of untrue statements made by others, and she did not believe she was being treated fairly.

¶9 McClain testified that Eisenberg did not respond to the July 30 letter before the August 2 plea hearing. According to McClain, she met briefly with Eisenberg at the courthouse just before the plea hearing and she told him she was uncomfortable and did not like what was going on. His response was that she did not have the $30,000 he required in order to represent her in a trial and he said "just fire me." He never discussed any of the concerns or questions she raised in either of her two letters; they spent only "a few minutes" discussing her case.

¶10 McClain testified that she filled out the plea questionnaire because she did not know what else to do and she felt she had no viable option. She felt under a time pressure to make a decision and did not feel she had adequate time to talk to Eisenberg about her concerns. She entered a no contest plea as opposed to a guilty plea because she was not guilty of committing any crime. Her explanation for answering yes to the court's question whether she was adequately represented by Eisenberg was that she did not know what the consequences of saying no would be, and she answered yes to the court's question whether she had an adequate opportunity to review the case with Eisenberg because she did not know what else to do. She also testified she did not know what to say, and that, when the court asked a question, "[she] turned to [Eisenberg] and he nodded to me what I should say, and I just went along and answered those questions accordingly."

¶11 About two hours after she entered the plea, McClain testified she contacted Hahn and told her of her concerns and Hahn referred her to an attorney. She contacted that attorney and several other attorneys and eventually hired Fitzgerald.

¶12 Eisenberg's testimony conflicted with McClain's on several significant points. He testified that he discussed possible defenses with McClain, including the substance of what she referred to as an "implied consent defense," although he may not have used that term. He had his billing records with him, and based on those, testified to his meetings and phone calls with McClain, which were more numerous and more extensive than McClain testified to. He had extensive notes on the investigating officer's report. He discussed possible defenses with McClain, including her belief that she was authorized to do what she did. He conveyed his concern to her that the checks, which were the subject of the charges and were not co-signed, were signed by her on the same day on which

other checks that she signed were co-signed. He had a list of other concerns based on the investigative report, which he also discussed with her. His opinion was that her defense—that she believed she had the authority to do what she did—was not going to be successful, and he told this to her.

¶13 Eisenberg testified he was always under the impression McClain wanted a deal because she did not want to go to jail, although he acknowledged that at the end she vacillated. He agreed that she continued to assert to him her belief that she had the authority to pay herself for the work she did for TLP, but testified she also consistently said she wanted to enter a plea and she did not want to go to trial; he agreed that she "vacillated" between those two positions. She never told him that she wanted to go to trial. Eisenberg's belief about what McClain wanted was based in part on a letter she wrote to him on May 5, 1999, in which he said she did not want to go to trial, but also on conversations with her. His instructions were to get the best possible deal. One of the purposes of the investigation was to try to gather information to convince the prosecutor that McClain "wasn't as bad" as the persons interviewed by the investigating officer indicated. Eisenberg recalled that McClain authorized him to accept the State's offer to settle the case in mid-July.

¶14 According to Eisenberg's billing records, he reviewed both faxes from McClain on July 30. He did not have a record that he called her after receiving either fax, but he doubted that he would have failed to communicate with her in response before the plea hearing; if he called her at home, over the weekend, or in his car, he would not have made a record of the conversation. Based on his billing records, Eisenberg estimated he spent approximately one hour talking to McClain just prior to the plea hearing. He acknowledged she was confused in that meeting and described her confusion as "about what the outcome

would be." He outlined the case again for her and tried to answer her questions. He denied saying "either plead or fire me." He denied that he told her she could not afford to pay him for the trial, and testified that she had already indicated she could get the money to pay for a trial because it was coming from an estate. He had no doubt that he told McClain "if you don't want to plead, don't plead." He told her if she did not want to plead, she could go to trial, and although the judge might be upset if the plea hearing did not take place that day, the trial would be rescheduled. He may have told her that if she were really upset with him and did not want him to represent her, she could get another attorney and go to trial. He agreed that he told her if the case went to trial, she would lose.

¶15 Eisenberg testified that whatever concerns he might have had about what she wanted to do were alleviated in their discussion before the plea hearing. In his view, she understood when she pleaded that her choices were a plea or a continuance for a trial. He never instructed her either explicitly or implicitly to state she was satisfied with her representation, or what she should answer when the court asked her about having sufficient time to review the case with him. He did not have any reservations when she pleaded that she was not doing it voluntarily, and he would not have let her do it if he felt she had any reservations.

¶16 Eisenberg testified that McClain entered a no contest plea rather than a guilty plea because that is always his practice in a case where money is involved; a no contest plea cannot be used against a defendant in a civil case to establish liability, whereas a guilty plea establishes it as a matter of law.

¶17 In argument after the testimony, the State conceded it could not show prejudice.

¶18 The court ruled McClain had not presented sufficient credible evidence that she had a fair and just reason to withdraw her plea. Specifically, it considered whether Eisenberg had discussed with McClain the defense of implied consent and found his testimony to be credible, and it referred to the transcript of the plea hearing, which it considered strong evidence that McClain understood what she was doing at the time she entered the plea.

DISCUSSION

¶19 A defendant seeking to withdraw a plea of guilty or no contest before sentencing must show a fair and just reason for allowing him or her to withdraw the plea. ***State v. Shimek***, 230 Wis. 2d 730, 738-39, 601 N.W.2d 865 (Ct. App. 1999). If the trial court finds the defendant's evidence credible and determines that it constitutes a fair and just reason, the court should permit withdrawal unless the prosecution would be substantially prejudiced. ***Id.*** at 739. The showing of a fair and just reason contemplates the "'mere showing of some adequate reason for the defendant's change of heart.'" ***Id.*** (quotation source omitted). A circuit court is to apply this test liberally, although a defendant is not automatically entitled to withdrawal. ***Id.***

¶20 The purpose of permitting plea withdrawal before sentencing under this liberal standard is to facilitate the efficient administration of justice by reducing the number of appeals contesting the knowing and voluntariness of a plea; it also ensures that a defendant is not denied a trial by jury unless he or she clearly waives it. ***Id.*** According to prior case law, "fair and just" reasons include: genuine misunderstanding of the plea's consequences, haste and confusion in entering the plea; coercion on the part of trial counsel, and confusion resulting from misleading advice from defendant's attorney; we have also identified the

assertion of innocence and the promptness with which the motion is brought as factors relevant to the court's consideration. ***Id.*** at 739-40.

¶21 Whether to permit the withdrawal of a guilty or no contest plea before sentencing is a determination committed to the trial court's discretion. ***Id.*** at 739. We sustain the trial court's discretionary determination if it reached a reasonable conclusion based on the correct legal standard and a logical interpretation of the facts. ***Id.***

¶22 We first consider McClain's contention that the trial court erred in its view of the law. McClain argues the court believed that a defendant's testimony as a matter of law did not suffice to establish a fair and just reason because a defendant always needs some evidence in addition to his or her testimony to meet the burden. We agree with McClain that this is not a correct view of the law, but we do not agree the trial court applied this incorrect principle.

¶23 The court began its comments by correctly describing the general standards for a plea withdrawal prior to sentencing. The court then referred to ***State v. Kivioja***, 225 Wis. 2d 271, 592 N.W.2d 220 (1999), as setting forth the manner in which the defendant must meet the burden of establishing a fair and just reason. In ***Kivioja***, the defendant argued that the trial court is precluded from considering the credibility of the evidence a defendant offers in support of a motion to withdraw a plea prior to sentencing. In that defendant's view he had only to present "plausible" evidence of a fair and just reason which, he contended, was a lesser requirement than "credible" evidence. The court rejected this argument, concluding that the terms were synonymous and that regardless of which term was used, the defendant had to bring forth evidence that the trial court finds believable, with the weight of evidence and credibility of witnesses entrusted

to the trial court. ***Id.*** at 289. The court explained that the defendant is not entitled to withdraw a plea before sentencing simply by asserting a reason that has been recognized as fair and just; rather, the trial court must first determine the proffered reason actually exists, and to do so, the trial court must make credibility determinations. ***Id.*** at 291.

¶24 We are persuaded from this trial court's comments that it correctly understood and applied the holding of ***Kivioja***. It is true that some of the phrases singled out by McClain might, in isolation, indicate that the testimony of a defendant could never, as a matter of law, establish a fair and just reason. However, when read in context, it is evident to us that the trial court was saying it had to assess McClain's credibility and it did not need to accept her testimony as establishing a fair and just reason, but could assess her testimony in light of the other evidence. That is a correct statement of the law.

¶25 A second error of law, McClain contends, was that the trial court believed McClain had to "overcome" her attorney's credibility. We agree with McClain that there is no presumption of credibility accorded to a defendant's attorney, but again we are persuaded the court did not apply this incorrect principle. After referring to the inconsistencies between McClain's testimony on the one hand, and Eisenberg's testimony and his records on the other, and describing Eisenberg's testimony as "credibly responding" to McClain's testimony that he had not discussed the implied consent defense with her, the court summed up:

> Going back to ***Kivioja***, I don't find that she has presented sufficiently credible evidence. Her recollections, as I say, are contrary to the records and to the testimony of Mr. Eisenberg, and it's my opinion that she has not overcome his credibility in this matter, and my determination as to weight to be given and to the credibility is not such that I

> can find that she's met her burden. Therefore, I deny the motion to withdraw the plea.

Read in context the phrase "overcome his credibility" does not mean the court is attaching more weight or credibility as a matter of law to McClain's attorney's testimony; rather, the phrase describes the court's specific credibility assessment in this case. McClain's testimony on significant points necessary to establish a fair and just reason was in conflict with Eisenberg's testimony as well as his records and, since the court found his testimony more credible than hers, she did not establish a fair and just reason.

¶26 McClain next contends the trial court did not follow the law because it did not apply the "fair and just" standard in a liberal manner. Much of this argument is a repetition of the two arguments we have already addressed. In addition and without elaboration, McClain asserts that a liberal application of the standard "implies that the court will give the benefit of the doubt in a close case to the defendant." If McClain means that where there is a credibility conflict, the court must accept the defendant's testimony rather than his or her attorney's, we reject that argument because it is inconsistent with ***Kivioja***. If McClain means something else by this assertion that we have not already addressed, we are uncertain what that is and therefore do not further consider this argument.

¶27 McClain's fourth claim of error is that the trial court failed to consider whether she entered the plea in haste, without adequate consideration of the available defenses. McClain acknowledges that the court considered whether Eisenberg had discussed the implied consent defense with her and found he had. But, according to McClain, the court did not use the word "adequate" in summarizing the reasons she asserts for withdrawing her plea and therefore did not consider whether the discussions of implied consent were such that McClain

adequately understood the concept. We do not agree that the omission of the word "adequate" from the court's reading of the reasons McClain asserts in her motion shows that the court did not apply the correct standard. Looking at the substance of the court's analysis, we are satisfied it understood that the critical question was not simply whether her attorney had ever discussed the implied consent defense with her, but whether he had explained it sufficiently to her so that she was not confused or misinformed when she entered her plea. If the court chose to believe Eisenberg's testimony, which it did, there was ample basis for the conclusion that both McClain and her attorney adequately considered this defense before she entered her plea.

¶28 Finally, McClain contends the record supports a determination that she entered her plea in haste and confusion. While there is evidence that could support such a determination, we are satisfied that, after resolving the credibility disputes in Eisenberg's favor, the court could reasonably decide McClain did not enter her plea in haste, and that she adequately understood the available defenses.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.